

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION I
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

DAVID C. TUCKER, CLERK

STATE OF TENNESSEE)
)
vs.) No. 2005-D-2854
)
ARTHUR WAYNE MARCH)
and PERRY AVRAM MARCH)

**MOTION TO EXCLUDE EVIDENCE OF DEFENDANT'S
COMMUNICATIONS WITH JAILHOUSE INFORMANT(S)**

Comes now the accused, by and through counsel, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, §§ 8 and 9 of the Constitution of the State of Tennessee, Rules 12(b) and 47 of the Tennessee Rules of Criminal Procedure, and Rule 408 of the Tennessee Rules of Evidence, and moves to exclude from evidence any and all communications between the accused and Russell Nathaniel Farris, a/k/a Bobby Givings, as well as any and all communications between the accused and any other person then in custody (or apparently in custody), where the other participant was cooperating with authorities such that the subject communications violated the accused's right to counsel pursuant to *State v. Berry*, 592 S.W.2d 553 (Tenn. 1980), *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964), and the progeny

of such decisions. The accused further seeks exclusion of any and all evidence derived from any antecedent breach of or interference with the accused's right to counsel in the preexisting murder prosecution.

For cause the accused would show that he was taken into custody on August 3, 2005 in the matter of *State of Tennessee v. Perry Avram March*, Davidson County Criminal Court No. 2004-D-3113. He was transported on August 12, 2005 by members of the Metropolitan Police Department from Los Angeles, California to Nashville, Tennessee. At the outset of this trip the accused informed police that he was represented by counsel and did not wish to communicate with authorities without counsel present.

Since August 12, 2005 the accused has been housed at the Metropolitan Criminal Justice Center in the Special Management Unit. Access to Mr. March by other persons within the Special Management Unit is (or should be) tightly controlled by the Sheriff's Department.

The accused was arraigned in Case No. 2004-D-3113 on August 17, 2005 (and in the instant matter on November 9, 2005). He has at all times since been represented by John Herbison of the Nashville bar and William Massey and Lorna McClusky of the Shelby County bar. Despite this representation by counsel, authorities nevertheless (in Case No. 2004-D-3113) chose to flout and flagrantly disregard the prohibitions of the *Massiah* and *Berry* line of cases by causing or encouraging at least one jailhouse snitch, Russell Nathaniel

Farris, to elicit information from the accused.

It appears that some of the conversations between Mr. March and Mr. Farris were preserved by audio recording. Defense counsel respectfully submit that, at least as to conversations which were recorded by the snitch, the State can assert no good faith argument that, as to charges then pending on which Mr. March was represented by counsel, the conduct of law enforcement comported with *Massiah* and *Berry*. The State should not be permitted in the instant case to profit from its agents' descent into lawlessness. As Justice Holmes observed, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920), overruled on other grounds by *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980).

The Defendant is charged in Case No. 2004-D-3113, with one count of second degree murder, one count of evidence tampering and one count of abuse of a corpse. The instant conspiracy/solicitation case is currently scheduled to be tried sooner than the second degree murder case. A similar motion to suppress the jailhouse snitch conversations is contemporaneously filed in Case No. 2004-D-3113.

If the Court were to determine that the jailhouse snitch's conversations with the accused are inadmissible as to the second degree murder case but admissible as to the

instant, conspiracy/solicitation case, the accused would move the Court to continue the trial of the conspiracy/solicitation case until after the conclusion of the trial of the murder case. The accused would show that both prosecutions are the subject of widespread public interest, and both have generated (and will in all likelihood continue to generate) pervasive media coverage. The accused avers that, should evidence which is inadmissible at the murder trial be offered and admitted at the earlier scheduled conspiracy/solicitation trial, any prophylactic benefit of the rule excluding evidence derived from a breach of or interference with the accused right to counsel would be significantly undermined, if not destroyed with regard to the murder case.

Under such a set of facts, the universe from which jurors for the murder trial are to be drawn will be irremediably tainted by news coverage of the earlier occurring conspiracy/solicitation trial, including coverage of evidence which is inadmissible at the murder trial. The seating of an impartial jury for the murder trial would thereby be made exponentially more difficult.

In view of the above, the accused respectfully contends that, should the Court determine that conversations between the Defendant and the snitch are inadmissible at the second degree murder trial and that such conversations are nevertheless admissible at the instant conspiracy/solicitation trial, due process and fundamental fairness require that the murder case be tried first in order to avoid poisoning the jury pool with regard to the

murder trial.

THE FOREGOING PREMISES CONSIDERED, the Defendant respectfully moves the Court exclude from evidence any and all communications between the accused and Russell Nathaniel Farris, as well as any and all communications between the accused and any other person then in custody (or apparently in custody) where such communications occurred in violation of the right to counsel, as well as all evidence derived therefrom. The accused requests an evidentiary hearing on this motion.

Respectfully submitted,


JOHN E. HERBISON # 12659
2016 Eighth Avenue South
Nashville, TN 37204
(615) 297-5900

WILLIAM D. MASSEY # 9568
LORNA S. McCLUSKY # 16803
3074 East Street
Memphis, Tennessee 38128
(901) 384-4004

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, this 16th day of February, 2006.



JOHN E. HERBISON